

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

¹³
No. 711

THE UNITED STATES OF AMERICA,

vs.

Appellant,

UNITED STATES GYPSUM COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

STATEMENT OPPOSING JURISDICTION

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**DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

against

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants

OPPOSING STATEMENT AS TO JURISDICTION

Plaintiff's "Statement as to Jurisdiction" herein fails accurately to set forth the nature of the case and the decision dismissing the complaint on the merits. Rather plaintiff's statement presents the case in terms of what it charged but failed to prove after a protracted trial and unusually careful consideration of the evidence by a three-judge court, as fully appears in the final opinion of the Court. It totally disregards the findings of facts of the Trial Court which are to the effect that the evidence not only failed to establish the charges but proved that the facts were directly contrary thereto. We submit that a fair appreciation of the facts and decision will demonstrate that no substantial question is presented for review by the Supreme Court.

The case involved an attack by plaintiff on patent license agreements entered into at various times between United States Gypsum Company (hereinafter referred to as USG) as licensor and the other defendant companies as licensees. The licenses covered the manufacture and sale of patented gypsum board under patents owned by USG. The history and background of these licenses is as follows.

Prior to 1912, gypsum board was a rough and crude product. It was made in a slow, cumbersome way, by pouring a mix of calcined gypsum and water between pieces of paper and pressing the mass on a table. After the gypsum had set, the pieces of board were dried out by stacking them in the open air under sheds. In 1912, USG commenced the development of more satisfactory products and more efficient methods of manufacture. An important advance was in the making, by virtue of patent No. 1,034, 746, issued in 1912 to USG on application of an inventor-employee named Clarence W. Utzman, of "closed-edge board." This patent covered board with closed or protected edges and eliminated the wastage and breakage which were attendant on the prior product. Various other improvements were developed, including a board making machine, the use of foam as a substitute for sawdust as an "aggregate" in the gypsum board to lighten the board, and the use of starch to increase the bond between paper and core from which the board principally derives its strength. Metallized board was devised for purposes of insulation; and a gypsum lath perforated in such a manner as to increase the fire resisting qualities of a wall structure. These improvements were covered by patents—product, process, and machine—many of which were issued to USG; others were acquired by that company. A demand arose in the trade for these improved products, and companies other than USG commenced to copy them. There ensued many years of litiga-

tion in which USG strove to enforce and eventually succeeded in enforcing, its patent rights. (Finding of Fact, No. 5).

Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge board. USG sued for infringement and won. *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921), *cert. denied*, 263 U. S. 713 (1923). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co. v. Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights. Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting with Blagden in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents, acknowledgment by Beaver of the validity of USG's patents, payment of royalties, and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying \$250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines. (Finding of Fact, No. 6.)

In September, 1925, after the decision against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal)

for infringement, and served a notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately \$35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid, Atlantic not having previously made gypsum board. Texas Cement Plaster Company (Texas) signed a license agreement on April 11, 1927 under similar circumstances. (Finding of Fact, No. 7.)

In May, 1929, following further litigation, four more license contracts were entered into between USG and Certain-teed Products Corporation (Certain-teed), National Gypsum Company (National), Ebsary Gypsum Company, Inc. (Ebsary), and Niagara Gypsum Company, respectively. In 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about February 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking an injunction against the distribution of the proceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due to USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately

\$64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was dismissed and the bond released. On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages for past infringement approximately \$178,000 and entering into a patent license agreement with USG. Ebsary, which had commenced making open-edge gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it. Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board. USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Priority over the Clark application had been awarded Birdsey by the Commissioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark v. Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1001. A contract of settlement was entered into between Niagara in May, 1929, providing for the payment of damages of approximately \$28,000 and for a patent license to Niagara. (Finding of Fact, No. 9.)

In 1929 USG owned three applications for patents of Carlisle K. Roos covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of cells or voids thereby lightening the board, eliminating the use of sawdust, which had been an unsatisfactory material, as an

"aggregate," and resulting in quicker drying. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022, 2,079,338, and 2,080,009 were ultimately issued to USG (October 8, 1935, May 4, 1937, and May 11, 1937, respectively). On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention and outlined its advantages, including weight reduction, lower freight cost, elimination of the sawdust problem, easier handling and quicker drying, and offered the various licensees above referred to a license on this invention. (Finding of Fact, No. 11.)

Shortly after this, Universal through its president and co-receiver, Eugene Holland, claimed that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Hite and Haggerty patents Nos. 1,230,297 and 1,500,452, respectively. The Hite patent covered a heat insulating material and method of making the same. The Haggerty patent covered a gypsum plaster wallboard employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets. This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board. Without it, high temperatures used to expedite drying of the board would result in defective board in the form of "peelers," i. e., board having insufficient bond between the liners and the core. In 1927 Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringing of the Haggerty patent, demanding an injunction

and an accounting, and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co. v. Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. Avery told Holland that it was not USG's policy to infringe patent rights and that he would investigate the claim. In June and July of 1929 negotiations were going on between USG and its various licensees in respect of a possible license covering the bubble board invention, and the various companies were investigating to ascertain whether the invention had merit. During this same period Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions USG agreed to purchase and did purchase these patents. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary receivership proceedings were in seven different Federal district courts and the sale was approved by all of these courts on or about November 5, 1929. The sale was consummated in a license contract of November 5, 1929, which settled a claim of USG against Universal for infringement of USG's partially closed-edge patent and the claim of Universal against USG for infringement of the Hite and Haggerty patents. Universal was itself granted a license under these patents and under the Birdsey patent No. 1,358,508 and under patents which might be issued under the Roos and Bayer applications and under numerous other patents. This license contract superseded the 1926 license agreement between USG and Universal. In August, 1929, USG had announced its arrangement to purchase the Haggerty and Hite patents

and offered its licensees new licenses which would replace the prior license contracts and include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applications for patents on the Roos bubble board invention. This offer was made subject to the approval of the district courts above referred to. (Finding of Fact, No. 12.)

Niagara on October 8, 1929, Certain-feed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st, entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and these new contracts covered the Hite and Haggerty patents and also the anticipated patents under the Roos and Bayer applications as well as the unexpired patents of the earlier contracts. (Finding of Fact, No. 13.)

As mentioned above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been granted to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by American were resumed, with renewed efforts to obtain concessions with USG. On November 25, 1929, American finally settled its outstanding litigation with USG on the terms originally offered, i. e., on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately \$152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar

license. On January 3, 1939, USG consented to the assignment of this license to Newark. Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent, and no effort was made by any defendant or any agent of any defendant to establish or control the price at which Texas sold gypsum board during the period from August 6, 1929, until February 10, 1937, at which time its license of April 11, 1927, expired and Texas accepted a further license contract similar in form to the November, 1929, contract with the other licensees. (Finding of Fact, No. 14.)

The foregoing outlines the circumstances surrounding the signing of the main patent licenses involved in suit. Under each license royalties were paid and USG reserved the right to establish the minimum prices of patented gypsum board made and sold by each licensee thereunder. Under the earlier licenses, price control was limited to gypsum board made under the Utzman closed-edge patent, and such control terminated at the expiration of that patent on August 6, 1929. Under the later licenses, price control was operative only with respect to gypsum board made under product patents such as the Haggerty starch patent or, when issued, the Roos "bubble board" or foam patents. In other words, the right of the patentee to establish the licensee's minimum price was in all instances limited, by the terms of the contract and in actual operation, to patented board.

Plaintiff attacked these license agreements on various grounds:

(1) It was claimed that the licenses were not *bona fide* but were sham agreements executed to disguise illegal purposes. The Trial Court found, and the evidence established, directly the contrary. (Findings

of Fact, Nos. 29, 30.) Among other things the Court found that the licenses were openly negotiated between the respective parties, that the licensees took the licenses because they desired to settle or avoid litigation and because they considered it a business necessity to obtain the right to use USG's patents, that each of the companies decided to take a license independently and without regard to what other companies did, and that the licenses were executed on the faith of the *Bement* (186 U. S. 70) and *General Electric* (272 U. S. 476) cases. (Findings of Fact, Nos. 31-38.)

(2) It was claimed that defendants had, in addition to the patent license agreements, informal side agreements that unpatented products would be discontinued; that USG would advance and stabilize the prices for gypsum board; that all the companies would increase their prices on other, unpatented products; and that USG would continue to control prices through the use of other patents after the expiration of the Utzman closed-edge patent in August, 1929. The Trial Court found, and the evidence established, that no such agreements were made. (Finding of Fact, No. 56.)

(3) It was claimed defendants' operations under the licenses went beyond the proper limits of the patent monopoly. The Trial Court found, and the evidence established, that no such improper practices occurred. (Findings of Fact, Nos. 86-87, 89, 94, 99, 104.)

(4) It was claimed that the defendants unlawfully associated themselves in a plan to blanket the gypsum industry under patent licenses and stabilize prices. The Trial Court found, and the evidence established, that there was no such plan. (Finding of Fact, No. 118.)

(5) It was claimed that the *General Electric* case did not apply. The Trial Court held that there was no distinction between the *General Electric* case and the case at bar. (Findings of Fact, Nos. 24-28.)

Plaintiff asserts in its "Statement as to Jurisdiction" that the Trial Court ruled, on defendants' motion to dismiss, that every factual issue as to which evidence before the Court did not preponderate in favor of the plaintiff must be resolved against the plaintiff. What the Trial Court actually held was that on a motion to dismiss filed at the close of the plaintiff's case, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, it is the duty of the Court to weigh the evidence, to draw inferences therefrom, and if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendants on the merits and make findings of fact and conclusions of law. The Trial Court so applied the rule and each of its findings against the plaintiff was fully supported by the evidence.

Plaintiff also erroneously states that the Trial Court ruled that defendants did not have the burden of establishing that their price fixing was justified by their patent rights and that the Government had the burden of establishing the contrary. What the Court actually held was that the Government alleged various restraints of trade and commerce and had the burden of proving such alleged restraints. And in connection with allegations on the part of the Government that patent license agreements existed containing restraints which might have been improper without patents, the Trial Court held that the plaintiff had the burden of establishing some reason why the normal consequences which flow from the ownership of a patent should not follow in this case. For example, the Trial Court held that the plaintiff, having asserted that the patent licenses were intended by the parties to accomplish restraints beyond the proper limits of the patent monopoly and in actual operation were carried beyond such limits, had the burden of proving the charges made.

Plaintiff asserts that the Trial Court ruled that an agreement among the defendants that all would enter into like price-fixing licensing contracts would not be illegal and that the evidence failed to show that the defendants did so agree. The Court found, and the evidence established, that there was no such agreement.²⁵ The Court in its opinion said that in the absence of sham licenses and an intent to accomplish objectives beyond the proper limits of the patent monopoly such an agreement would not have been illegal.

Plaintiff asserts that the Court held that apart from certain declarations by defendants there was no evidence that the license agreements were "non bona fide" in character or purpose and that the evidence considered on this basis does not establish that the license agreements were sham or designed to achieve restraints of trade beyond the proper limits of the patent rights. The Court, as shown in its opinion, concluded, first, that the evidence introduced by plaintiff shows that the license agreements were executed as bona fide agreements intended to bind each party to the promises made therein, not as sham agreements to disguise illegal purposes, and, second, that the evidence fails to show that the license agreements were executed with intent to gain objectives beyond the proper limits of a patent monopoly in any of the respects charged. The Court also held that the evidence failed to establish that the operations of the defendants were carried beyond the proper limits of the patent monopoly and licensing thereunder. In reaching these conclusions the Court first applied the familiar rule that the declarations of certain of the defendants received in evidence subject to connection were binding only upon the declarant, the declarations rule having been invoked by the defendants and the plaintiff having failed, as found by the Court, to prove by evidence outside the declarations the existence of the conspiracy charged. The Court also stated its views

as to the meaning of all of the evidence when the declarations were considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators and concluded that the plaintiff still had not proved that the license agreements were executed not as bona fide license agreements but only as sham agreements to give color of legality to the illegal purposes alleged in the complaint or that the operations of the defendants were carried beyond the proper limits of the patent monopoly.

Plaintiff asserts that the licensing agreements provided for the fixing of minimum prices on all board made by USG's licensees which embodied any invention claimed in any of 49 patents. Price fixing only applied to product patents and, contrary to the plaintiff's assertion, not only are the two starch patents in evidence but a number of other patents including three patents covering gypsum board made with foam. In connection with such foam patents it may be noted that they are product patents and not process patents as plaintiff repeatedly implies. Moreover, there was evidence and a Finding that the use of starch contemplated by the so-called starch patents, which were also product patents, was essential to the successful manufacture of gypsum board.

Plaintiff further asserted that there was no showing that USG had a patent monopoly covering the vending of board not made under the starch patents and that consequently the price fixing agreement went beyond any patent monopoly which USG was shown to have. The complaint charged that the defendant licensees under their respective license agreements produced and sold patented board embodying the claims of the several product patents held by USG and the showing of which, plaintiff complains, was made by plaintiff itself. Upon the trial plaintiff failed to present any evidence that the gypsum board made and sold by defendants under the patent license agreements

was not covered by the patents and the Trial Court made a specific finding to this effect. (Finding of Fact, No. 55.) The application of the elementary rule which the Court applied that a pleader must prove those allegations which are essential to his complaint required the plaintiff to prove that the price fixing went beyond the limits of the patent monopoly. This it failed to do.

The Trial Court held, on the basis of the patents before it, that there was no distinction between such patents, which were product patents covering gypsum board, and the patents covering incandescent lamps in the *General Electric* case. (Findings of Fact, Nos. 24-28.) The Trial Court referred to those patents the plaintiff introduced which were but a few of the USG patents referred to in the licenses, just as the Court in the *General Electric* case referred to but three of the 216 patents included in the General Electric-Westinghouse license. That the licenses covered patents which the plaintiff failed to introduce can hardly be used to pose the question of whether the price fixing under the licenses referred to in the complaint went beyond the patent monopoly shown by plaintiff to exist.

It is thus clear that the first question asserted by plaintiff to be substantial on the appeal herein, i.e. "whether the *General Electric* case validates an agreement to fix prices which is not confined to products over which the licensor has a complete patent monopoly of the vending thereof," is in fact of no substance in this case.

The second question, asserted by plaintiff to be of substance, is whether the *General Electric* case authorizes "all members of the industry, pursuant to a common invitation," to enter into substantially identical licensing agreements. As we have stated, the evidence established, and the Trial Court found, that each of the licenses in suit

was entered into independently by each of the licensees and without regard to what other companies might do. Furthermore, in the absence of sham licenses or an intent to accomplish objectives beyond the proper limits of the patent monopoly, a common invitation to make such license agreements could hardly be said to be illegal. The Supreme Court's decision in *Interstate Circuit Inc. v. United States*, 306 U. S. 208, referred to by plaintiff in this connection, does not apply because there was no question there of the right of a patentee to fix the prices of his licensees under a patent monopoly and the case is clearly distinguishable from the *Bement* and *General Electric* cases, as pointed out in the opinion in the *Interstate Circuit* case and by the Trial Court in its opinion in this case under Topic VIII, pages 149-150. Thus, this question is without substance.

The next question, asserted by plaintiff to be substantial, is whether the *General Electric* case authorizes all competing manufacturers to "use patent license agreements as a means to organize their industry, increase and stabilize prices, eliminate jobbers, and otherwise regulate the industry in detail." In so far as plaintiff by this intends to imply that a plurality of licenses is wrongful, there can be no escape from the holdings in the *General Electric* and *Bement* cases, since, as the Trial Court held, the public is equally excluded and equally subjected to the patent owner's price whether there is no license, one license, or more. The Court also specifically found that the defendants herein did not use their patent license agreements for any of the purposes mentioned and further found specifically that there were no agreements among the defendants to organize the industry or to increase and stabilize prices or to eliminate jobbers or to otherwise regulate the industry, which findings are fully supported by the evidence. The decision of the Supreme Court in *United States v. Ma-*

sonite Corporation, 316 U. S. 265, referred to by plaintiff in this connection, does not apply since there was no question there as to the validity of a license to manufacture and sell under a patent monopoly, and is clearly distinguishable from the *Bement* and *General Electric* cases, as pointed out by the Court in its opinion in the *Masonite* case and by the Trial Court in its opinion in this case under Topic VIII, pages 150-151. Thus this question is without substance.

Plaintiff asserts that this case raises the question of whether the *General Electric* case should be overruled and that such a question is a substantial one. It is submitted that the rule of the *General Electric* case has been followed and reaffirmed by this Court from 1926 until the present time, that the rule has been relied upon by innumerable persons and companies in good faith and that the rule should not be changed by judicial act. We submit, therefore, that this question is not substantial.

The plaintiff asserts that a question of substance is presented because the Trial Court made a ruling that "the Government in a Sherman Act proceeding is not entitled to show the invalidity of the patents under which the defendants assert rights by way of justification for price fixing." This reference to a preliminary ruling of the Trial Court is inaccurate. The point passed upon was whether the Government in an anti-trust case could allege in its complaint that patents issued by the Government were invalid and therein seek a judicial determination that the Patent Office erred in issuing the patents. In other words, could the plaintiff in this case thus attack patents on grounds such as lack of invention, lack of novelty or utility and the like, all of which matters are delegated by

statute to the Commissioner of Patents for determination prior to the issuance of the patents. A careful reading of the opinion of the Trial Court on this point will show the true issue involved. Thus the Trial Court stated in its opinion on the subject (53 Fed. Supp. 889, at p. 892):

"It is not charged by the Government in its complaint that the issuance of the patents was obtained by fraud or any other wrongful act. What the Government asserts, in essence, is that, for the reasons set out in paragraph 46(a), the Commissioner erred in issuing the patents. It is to be noted further that the attack upon the validity of the patents, in this aspect of the case, is not upon the ground that they are invalid because being used in violation of the Sherman Act; it is the converse, that the Sherman Act is being violated, through the license agreements, because the patents upon which the agreements are based are invalid. It is also to be borne in mind that, while this is not an independent cancellation proceeding, but an antitrust suit in which the Government contends that the patents are invalid, nevertheless the Government is seeking a judicial determination that the Patent Office erred in issuing the patents and that they are for that reason invalid. * * *

Thus the ruling of the Trial Court was simply to the effect that plaintiff, having granted patents through its Commissioner of Patents to whom the duty was delegated by statute of determining questions of patentability, could not through its attorney general attack such determination in an antitrust suit. In so ruling the Trial Court followed the doctrine announced in *United States v. American Bell Telephone Company*, 167 U. S. 224. The Court applied a rudimentary principle of fairness and justice by holding that the plaintiff, having once issued patents through the Commissioner of Patents, should not be able

to repudiate its own action, in the absence of a charge of fraud in the obtaining of such patents. We submit that an appeal from such a ruling does not present a substantial question.

Finally plaintiff contends that the Trial Court's interpretation of Rule 41(b) of the Rules of Civil Procedure presents a question of substance. The point thus raised is simply whether on a motion to dismiss at the close of plaintiff's case it is the duty of the Court to weigh the evidence, to draw inferences therefrom and, if it finds the evidence insufficient to make out a case for the plaintiff, to render a decision for the defendants on the merits and make findings of fact and conclusions of law. The Trial Court so ruled following similar rulings made by the Circuit Courts of Appeals for the Seventh Circuit, the Sixth Circuit and the Ninth Circuit. It refused to follow two decisions both from the Circuit Court of Appeals for the Third Circuit. It is submitted that the Trial Court correctly acted in this action. Therefore this ruling presents no substantial question.

Dated, October 15, 1946.

Respectfully submitted,

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